

Virtual Proceeding Protocols – Supreme Civil & Surrogate’s Courts

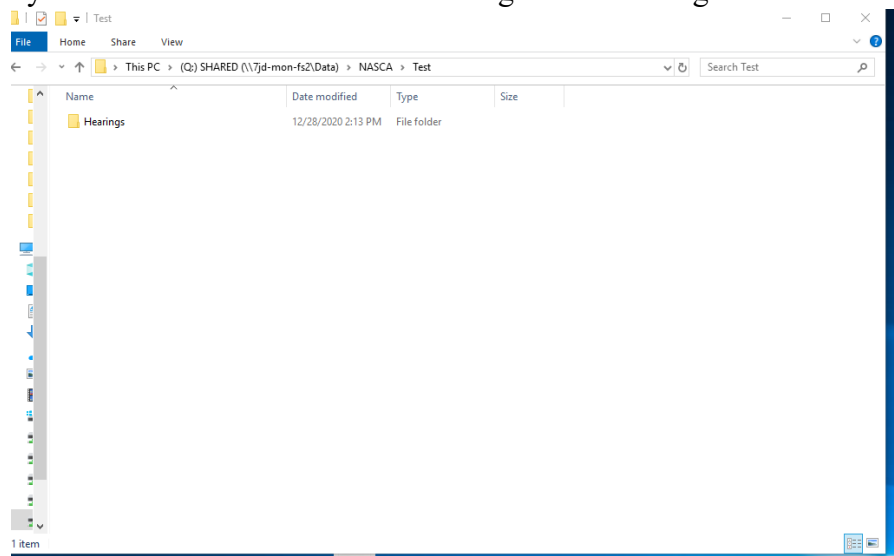
I. Platform options for housing electronic exhibits:

- a. UCMS:
 - i. Not available at this point for document upload in Supreme Court.
 - ii. For Surrogate’s Court, Surrogate’s UCMS would need to be modified to allow for a “subrecord” designed specifically for housing and managing trial exhibits.
- b. NYSCEF:
 - i. Eventual transition to NYSCEF “Virtual Evidence Room” as platform after Pilot Project finalization and roll-out. Virtual Evidence Room will be accessible by Court but not part of the County Clerk’s file.
- c. Court network: may have to be the repository for electronic evidence until NYSCEF Virtual Evidence Room is cleared for use after Pilot Project.

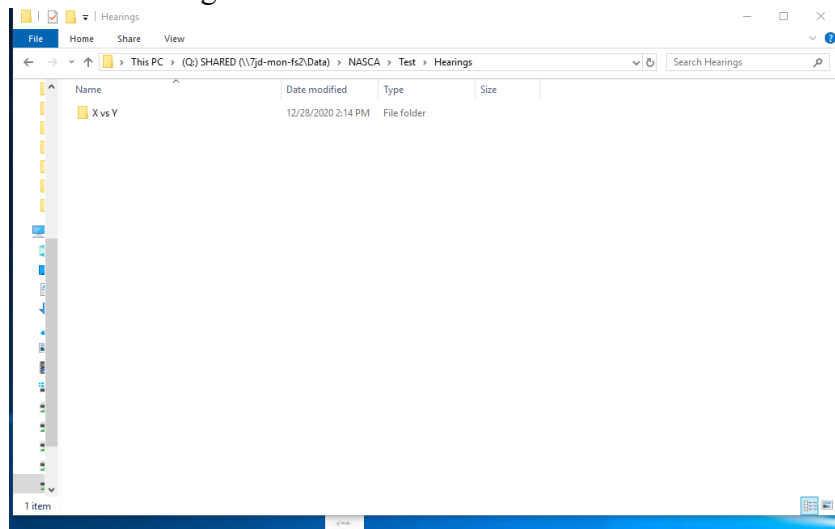
II. Pre-hearing considerations:

- a. Procedure for Attorney/Self-Represented Party review of subpoenaed documents returnable to the Court.
 - i. The Attorney/Self-Represented Party will make a request in writing to the Court/Court Clerk for a specific date and time to review documents.
 - ii. The Court will provide the Clerk’s Office and Attorney/Self-Represented Party with an order approving or denying the request. (See Attachment A.) The order will state that no cell phone or electronic device recordings are permitted to be used to copy, photograph, video record, or otherwise transmit the documents. The order will also state that the reviewer is not to damage or write on the documents.
 - iii. Upon arrival at the Court Clerk’s Office, the Attorney/Self-Represented Party will sign out the subpoenaed records from the Clerk’s Office on a form containing the language from the approval order that no cell phone or electronic device recordings are permitted to be used to copy, photograph, video record, or otherwise transmit the documents and that the reviewer is not to damage or write on the documents.

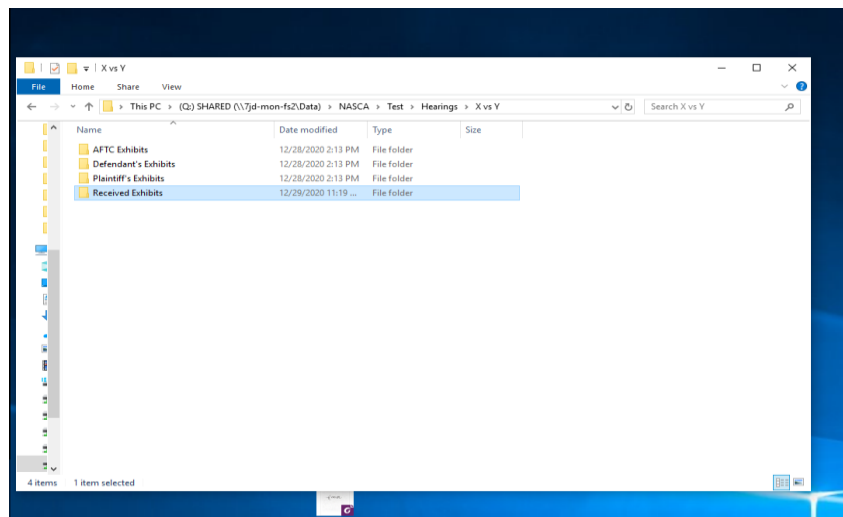
- iv. The Attorney/Self-Represented Party will review the documents at the courthouse in a public/supervised location.
- b. Pre-hearing procedure for where and how to house electronic exhibits until hearing.
 - i. Attorney/Self-Represented Party to mark electronic copies of exhibits to be used during hearing with Plaintiff's exhibits using numbers (Plaintiff's Ex. 1, etc.) and Defendant's exhibits using letters (Defendant's Exhibit A, etc.). Attorney for the Children exhibits will use numbers (AFTC Exhibit 1, etc.)
 - ii. A separate PDF document will be provided for each exhibit and the filename for each exhibit will contain the party and exhibit number (i.e. Plaintiff's Exhibit 1.pdf, Defendant's Exhibit A.pdf etc., AFTC Exhibit 1.pdf, etc.).
 - iii. For multiple page exhibits, all pages must be numbered. Handwritten page numbers at the bottom of each page are acceptable.
 - iv. Electronic copies of each proposed exhibit will be provided to the Court by email or secure messaging, at least 10 days prior to the hearing.
 - v. At least 10 days prior to the hearing, each Attorney/Self-Represented Party will exchange and provide the Court with an electronic Trial Exhibit List, in Word/WordPerfect and PDF formats, containing the list of proposed exhibits with a brief description of each exhibit.
 - vi. Utilizing UCS network to house electronic exhibits:
 1. a "Hearings" folder will be created for each judge that will be accessible by Chambers and the Court Clerk assigned to the Judge or matter.



2. Within the “Hearings” folder, a subfolder will be created by Chambers for each hearing.



3. For each hearing, separate subfolders will be created for “Plaintiff’s Exhibits”, “Defendant’s Exhibits”, “AFTC/Third Party Exhibits”, and Received Exhibits.



- c. If an exhibit to be presented is something other than an object in electronic form (i.e. a physical object) the proffering party will retain custody and control of the item of physical evidence until the item is offered and received into evidence during the trial. Prior to trial, the opposing party shall be able to inspect and photograph the item where it is being stored by the proffering party. Once the item is received into evidence, the proffering party shall deliver the item to the Court Clerk, with opposing counsel present to ensure that it is the same item. Upon receipt of the item, the Court Clerk will physically mark the item as received.

- d. The Court will provide a copy of each party's Exhibit List to the Court Clerk and the Court Reporter prior to the first day of trial.
- e. Pre-hearing procedure for circulation of exhibits between counsel and to witnesses.
 - i. At least 10 days prior to the hearing, the Attorney/Self-Represented Party will exchange electronic copies of their exhibits by email or secured messaging. Upon receipt of the electronic copies of the exhibits, the recipient will send an email to the sender confirming that they have received the documents and were able to open all the documents.
 - ii. At least 10 days prior to the hearing the Attorney/Self-Represented Party will provide each of their witnesses with copies of the exhibits that are relevant to the witness' testimony and role in the case. The relevant exhibits provided to the witnesses must be identical to the exhibits contained in the complete set provided to the Court and may not contain any notes, highlighting, post-its, or any other changes or additions from the complete set.
- f. Pre-hearing procedure for submission of witness list with contact information for witnesses.
 - i. In matters where all parties are represented by counsel, the Attorneys shall confer with each other regarding the witnesses to be called and the order they will be called prior to submission of their Witness Lists.
 - ii. At least 10 days prior to the hearing, the Attorney/Self-Represented Party will exchange and provide to the Court a PDF document entitled "Witness List" that contains a list of the names, telephone numbers, and email addresses of each witness they intend to call during the hearing, the order in which they shall testify and the anticipated length of their testimony. (See also 22 NYCRR 202.37)
 - iii. The Attorneys/Self-Represented Party shall notify the Court at or before the time of submission of the Witness List if any of the parties or witnesses require a language interpreter so that appropriate arrangements can be made.
 - iv. The Court will provide a copy of each party's Witness List to the Court Clerk and the Court Reporter prior to the first day of trial.
- g. Procedure for providing witnesses with MS Teams invitations and instructions for witness etiquette during the hearing.

- i. It is the responsibility each Attorney/Self-Represented Party to provide the MS Teams invitation to each witness in advance of the hearing and to ensure that the witness has the understanding and ability to appear virtually for their testimony. It is strongly recommended that the Attorney/Self-Represented Party/Witness install MS Teams AND run a test prior to the scheduled trial date.
- ii. Prior to the hearing the Attorney/Self-Represented Party will instruct all their witnesses on the following procedures and hearing etiquette:
 1. Witnesses are not to log onto the conference until prompted to do so; the Court will allow each party time to telephone their witness to prompt them to log in when it is time to give their testimony.
 2. Witnesses shall refrain from speaking to anyone about what is occurring in the hearing until after they have testified and been excused from further testimony.
 3. Witnesses shall have available for reference any exhibits that have been provided to them prior to the hearing; but will not review them unless directed by the Court to do so.
 4. Witnesses shall have a separate video feed from any attorney or party.
 5. Video and audio taping of the proceedings is strictly prohibited.
 6. During their testimony, witnesses:
 - a. should be in a location that is quiet and without distractions;
 - b. shall dress and act in a manner that is appropriate for court proceedings; and
 - c. shall refrain from eating, smoking, chewing gum, or consuming alcoholic beverages during their testimony.

h. Pre-hearing Exhibit Stipulations

- i. In matters where all parties are represented by counsel, the Attorneys shall review the exhibits and provide the Court with a list of exhibits that will be stipulated into evidence. The Attorneys must confer with each other and make a good faith effort to agree on exhibits that will be offered into evidence without

objection and the redaction of such exhibits as necessary. (See also, 22 NYCRR 202.34)

- ii. For matters where one or more parties are not represented by counsel, the assigned Judge or her/his law clerk will conference the matter to determine what, if any, exhibits can be stipulated into evidence. This conference will be conducted on the record, using a Court Reporter, FTR device, or Sound Tap software.
- i. See Attachment B for an example of a Day Certain Order for a Virtual Bench Trial.

III. During the hearing considerations:

- a. All Attorneys, Self-Represented Parties and witnesses must participate in the hearing via MS Teams, by video and audio.
- b. The Judge/Referee should begin every case with a colloquy that includes:
 - i. The case caption, index number and date;
 - ii. An identification of the parties and their attorneys;
 - iii. Confirm with each participant that there is no one else in the room or present on the MS Teams call;
 - iv. Instruct lawyers and litigants to mute microphones when not speaking;
 - v. Remind lawyers and litigants that courtroom rules apply - speak one at a time and do not interrupt other speakers, including the judge; and
 - vi. Unauthorized recording of the virtual proceeding is strictly prohibited.
- c. No witness shall join the virtual trial until prompted/invited to do so.
- d. All Attorneys/Self-Represented Parties/Witnesses shall participate in the virtual trial from a quiet environment (no background noise or other distractions – cell phones off, no children, no pets, etc.).
- e. Witnesses shall refrain from eating, smoking, chewing gum, or consuming alcoholic beverages during their testimony.
- f. Third-Party (Non-Party) Witnesses shall not communicate with anyone about what is occurring at the trial until their testimony is complete.

- g. Third-Party (Non-Party) Witnesses, who may be called to testify, may not be present or located where they could overhear the proceeding.
- h. Any recording of the virtual trial is strictly prohibited.
- i. Coaching, signaling, or assisting any witness are strictly prohibited.
- j. Courtroom rules apply. Attorneys/Self-Represented Parties/Witnesses will speak one at a time and not interrupt other speakers.
- k. Witnesses may not testify using a virtual background or a blurred background.
- l. The Third-Party (Non-Party) Witness shall testify from the Third Party (Non-Party) Witness' office/home or other location arranged by the attorney calling the Third-Party (Non-Party) Witness to testify. The Third-Party (Non-Party) Witness shall not testify from the attorney's office or at a location with another witness.
- m. No other individual may be present, either physically or electronically, with the Third-Party (Non-Party) Witness or so near the witness as to be seen and/or heard by the Third-Party (Non-Party) Witness during their testimony. An exception can be made for an individual who is not a witness to be present only to assist the witness in the use of the computer equipment/camera or because the witness requires physical assistance due to a medical condition. The presence of any such individual providing assistance must be disclosed to the Court, all parties and their attorney(s) and the Court Reporter (or on the FTR or SoundTap if the proceedings are being recorded).
- n. Procedure for marking new exhibits for identification.
 - i. For exhibits that were not provided in the pre-trial submission of documents, the Attorney/Self-Represented Party will email a PDF copy of the proposed exhibit to the Court Clerk who is assigned to the hearing.
 - ii. The Attorney/Self-Represented Party will advise the court, on the record, of the proposed exhibit number/letter.
 - iii. Using Foxit Phantom PDF, and the Typewriter tool, the Clerk will type the proposed exhibit number/letter on the exhibit.
- o. Procedure for marking exhibits as received into evidence.
 - i. When an exhibit that has been marked for identification has been received into evidence, the Judge/Referee will audibly indicate that the exhibit is received into

evidence and the Court Clerk/Referee, using the Foxit Phantom PDF Typewriter tool will type “Rec’d” below the exhibit number/letter.

- ii. The Court Clerk/Referee will right click on the box containing the “Rec’d” notation and will click “Properties” and check the “Locked” box to lock the notation.
 - iii. The Court Clerk/Referee will move the received exhibit to the Received Exhibits subfolder.
- p. Procedure for redacting/modifying new exhibits before being received into evidence.
- i. For PDF documents – Using Foxit Phantom PDF, 1) block the area to be redacted using Text and Images command; 2) click Apply Redactions.
- q. Procedure for making a record of the proceedings (Court Reporter, FTR, SoundTap).
- i. Depending on the protocol in place for each type of hearing, a record of the virtual proceedings will be made by a Court Reporter, FTR or SoundTap.

IV. Post-hearing considerations:

- a. Procedure for separating received exhibits from exhibits not received into evidence and providing access to received exhibits to the fact finder.
 - i. Received exhibits will be found in the Received Exhibits subfolder. The Judge/Referee, law clerk/court attorney, and Court Clerk will have access to this subfolder.
- b. Procedure for return/elimination of exhibits not received into evidence from platform, post-hearing.
 - i. After the filing of the decision resulting from the hearing, Chambers/Referee will delete exhibits that were not received into evidence during the hearing.
- c. Procedure for retention or return of received exhibits after issuance and filing of decision.
 - i. Exhibits received into evidence shall be retained or returned pursuant to the Court’s current procedures for retention/return of hard copy exhibits.

Attachments:

Attachment A – Subpoenaed Document Release Order

Attachment B – Day Certain Order (Virtual Trial)

Attachment C - Best Practice Tips for Microsoft Teams Proceedings 7th Judicial District Court
Reporters and the 7th Judicial District Moving Forward Committee

Attachment A – Subpoenaed Document Release Order

At an Ex Parte term of the Supreme Court,
Monroe County on _____, 2021

PRESENT: HON. _____
Justice of the Supreme Court

SUPREME COURT
COUNTY OF MONROE STATE OF NEW YORK

Plaintiff,

Index No.

ORDER

v.

Defendant.

WHEREAS, Plaintiff's/Defendant's counsel has subpoenaed certain records for trial in this matter (the "materials"); and,

WHEREAS, Plaintiff's/Defendant's counsel has requested access to review such materials;

NOW, THEREFORE, IT IS HEREBY

ORDERED that the Clerk of the Court shall release the records to _____, counsel for the Plaintiff/Defendant, for the purpose of reviewing said such materials in the Hall of Justice/Courthouse; and it is further

ORDERED that no cell phone or electronic device recordings are permitted to be used to copy, photograph, video record, or otherwise transmit the documents; and it is further

ORDERED, that counsel for the Plaintiff/Defendant is not to damage or write on the documents; and it is further

ORDERED that neither the parties nor their counsel shall disclose the materials or their contents directly or indirectly to any person or entity other than persons employed to assist in the prosecution or defense of this action, persons who are interviewed as potential witnesses, counsel for potential witnesses, and other persons to whom the Court may authorize disclosure.

Dated: _____, 2021

Hon. _____, J.S.C.

Attachment B – Day Certain Order (Virtual Trial)

STATE OF NEW YORK
SUPREME COURT

COUNTY OF MONROE

,

v.

,

Plaintiff,

Defendant.

DAY CERTAIN ORDER
(Virtual Trial)

Index No.:

ORDERED, that the Trial of this action shall commence on a Day Certain on **February 22, 2021 at 9:30 a.m. All Attorneys, Self-Represented Parties and witnesses must participate in the hearing via MS Teams, by video and audio;** and it is further

ORDERED, that pursuant to New York Uniform Rules Section 125.1 (g), if any attorney designated as trial counsel is actually engaged in trial elsewhere on the above date, said attorney may produce substitute trial counsel; and it is further

ORDERED, that **ten (10) days** prior to the commencement of the trial, the parties shall submit to the Court and opposing counsel:

- (1) copies of all pleadings submitted on behalf of their clients in this action that have not already been uploaded to NYSCEF;
- (2) a written stipulation governing all facts that are not in dispute;
- (3) a proposed finding of fact on each disputed issue. If the finding of fact involves a determination of a monetary award, it shall be set forth in such detail as is required to reach the award the proposing party will argue should be incorporated in the judgment.
- (4) failure to comply with decretal subparagraphs 1-3 above may result in an award of counsel fees to the side in compliance; and it is further

ORDERED, that if not disclosed previously, **ten (10) days** prior to the trial date, each party shall provide the Court and opposing counsel, a **list of all witnesses** (parties, experts or others) the party expects to call to provide live testimony via MS Teams, except witnesses who may be called only for impeachment or rebuttal. The witness list shall contain names, telephone numbers, and email addresses of each witness they intend to call to testify at trial.

The list shall identify witnesses the party expects to call to testify on MS Teams and those intended to be called through deposition. A courtesy copy of such deposition testimony for the Court is required. As to any experts, the list shall provide the information called for by CPLR § 3101 (d) (1) (i).

If any additional witnesses come to the attention of counsel prior to the trial, a supplemental list must be prepared for the Court as soon as possible, with notice to the opposing counsel. This supplemental list must include

the reason why the witness' name was not disclosed earlier. Noncompliance with the intent and purpose of this Ordered paragraph may result in the exclusion of testimony and/or sanctions; and it is further

ORDERED, that at least **ten (10) days** prior to the trial date:

- (1) the parties shall mark all exhibits (Plaintiff's exhibits using numbers (Plaintiff's Ex. 1, etc.), Defendant's exhibits using letters (Defendant's Exhibit A, etc.) and Attorney for the Children exhibits, if any, will use numbers (AFTC Exhibit 1, etc.);
- (2) a separate PDF document will be provided for each exhibit and the filename for each exhibit will contain the party and exhibit number (i.e. Plaintiff's Exhibit 1.pdf, Defendant's Exhibit A.pdf etc., AFTC Exhibit 1, etc.);
- (3) for multiple page exhibits, all pages must be numbered. Handwritten page numbers at the bottom of each page are acceptable;
- (4) the parties will provide the Court with electronic copies of each proposed exhibit by email or secure messaging;
- (5) the parties will exchange electronic copies of their proposed exhibits by email or secured messaging. Upon receipt of the electronic copies of the exhibits, the recipient will send an email to the sender confirming that they have received the documents and were able to open all the documents;
- (6) the parties shall submit to the Court and opposing counsel an electronic Trial Exhibit List, in Word/WordPerfect and PDF formats, containing the list of proposed exhibits with a brief description of each exhibit. The Trial Exhibit list shall indicate which exhibits are stipulated into evidence. (Exhibits not listed in accordance herewith may be excluded at trial). All parties are herein ordered to consult with each other and, to the extent possible, enter into a stipulation governing the authenticity and admissibility of all exhibits;
- (7) the parties will provide each of their witnesses with copies of the exhibits that are relevant to the witness' testimony and role in the case. The relevant exhibits provided to the witnesses must be identical to the exhibits contained in the complete set provided to the Court and may not contain any notes, highlighting, post-its, or any other changes or additions from the complete set;
- (8) whenever a subject matter will reasonably require itemization, computation or illustration, counsel shall prepare such diagrams, photographs or other similar exhibits as may reasonably be necessary for a clear presentation of the subject matter. These shall also be shared with opposing counsel one week prior to trial; and it is further

ORDERED, that at least **seven (7) days** prior to trial, the parties will instruct all their witnesses on the following procedures and trial etiquette:

- (1) witnesses are not to log onto the conference until prompted to do so; the Court will allow each party time to telephone their witness to prompt them to log in when it is time to give their testimony;
- (2) witnesses shall refrain from speaking to anyone about what is occurring in the hearing until after they have testified and been excused from further testimony.
- (3) witnesses shall have available for reference any exhibits that have been provided to them prior to the

hearing; but will not review them unless directed by the Court to do so;

(4) witnesses shall have a separate video feed from any attorney or party;

(5) video and audio taping of the proceedings is strictly prohibited; and

(6) during their testimony, witnesses:

- a. should be in a location that is quiet and without distractions and not located where they could overhear the proceedings. No one else shall be present with the witness while they are testifying;
- b. shall dress and act in a manner that is appropriate for court proceedings;
- c. shall refrain from eating, smoking, chewing gum, or consuming alcoholic beverages during their testimony; and
- d. shall not testify using a virtual background or blurred background; and it is further

ORDERED, that each party shall provide the MS Teams invitation to each witness in advance of the trial and ensure that the witness has the understanding and ability to appear virtually, by audio and video, for their testimony.

It is strongly recommended that all parties and witnesses install MS Teams **AND** run a test prior to the scheduled trial date.

ORDERED, that **ten (10) days** prior to the trial, each party shall submit a trial **memorandum of law** to the Court and opposing counsel. The memorandum shall be brief, but comprehensive, and must address each question of law that the party expects to arise at trial. Copies of the cases cited in the memorandum shall be attached thereto; and it is further

ORDERED, any Order to Show Cause or Motion must be submitted to this Court no later than **fourteen (14) days** prior to the trial. Copies of the cases cited in the application's supporting Memorandum of Law must be attached thereto. Untimely applications will not be considered by this Court.

Dated: _____, 2021
Rochester, New York

HONORABLE _____
Justice of the Supreme Court

Attachment C

**Best Practice Tips for Microsoft Teams
Proceedings 7th Judicial District Court Reporters
and the
7th Judicial District Moving Forward Committee**

- The judge should begin every case with a colloquy that includes:
 - o The case caption, index number and date;
 - o An identification of the Teams participants;
 - o Confirm with each participant that there is no one else in the room or present;
 - o Instruct lawyers and litigants to mute microphones when not speaking;
 - o Remind lawyers and litigants that courtroom rules apply - speak one at a time and do not interrupt other speakers, including the judge; and
 - o Unauthorized recording of the virtual proceeding is strictly prohibited.
- Judges and attorneys shall make every effort to appear via video for the Teams proceeding and Judges may require attorneys to appear via video for Teams proceedings. Telephonic appearances should be limited to litigants who are unable to appear via video; however, criminal defendants must appear by video and are not permitted to appear by telephone/audio only. Where a civil litigant is unable to access the proceeding via video, that individual should use the call-in number included with the Teams invitation. Permitting an appearance via phone or speakerphone causes distortion in the quality of the audio, making it difficult to hear/understand and reduces the efficiency of the proceeding.
- It is important for the reporter to see who is speaking for speaker designation and comprehension.
- For the quality of the audio, judges and lawyers should use headsets.
- Lawyers and litigants must appear from a quiet space. Background noise is detrimental to the conditions necessary to ensure a clear and accurate record and diminishes the decorum of the proceeding.
- Litigants/attorneys not appearing via video must identify themselves each time they speak.
- Provide clear “on the record/off the record” direction at the beginning and end of each proceeding.
- If there is an interruption because the court reporter/attorney/litigant advises something was not heard, the person who was speaking should repeat what was said (others should not summarize or repeat for another speaker)

- When using running or open Teams link, lawyers and litigants who will be appearing should be told to wait for their case to be called before speaking (there is no need to announce their presence).
- Make periodic checks to make sure the court reporter and any participant has not been dropped from Teams due to technical issues.
- Do not use office phones on speakerphone to add parties to the proceeding. Do not use personal cell phones to call attorneys and litigants during a proceeding.